United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7016
75-7041

ORIGINAL

To be argued by Lester E. Fetell.

United States Court of Appeals

For the Second Circuit.

ROBERT ELLIOTT and SHIRLEY ELLIOTT,
Plaintiffs-Appellees,

against

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING CO., INC., MAGGIOLO FOUNDATION CORP., G & A CONTRACTING CORP. and RONNIE GORR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS-APPELLANTS MAGGIOLO.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-8078—1975

(5853)

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Statement.

This is an appeal from a judgment in the sum of $350,000 awarded by a jury in favor of plaintiff Robert Elliott for personal injuries, and $28,000 to his wife Shirley Elliott on her derivative cause of action.

Plaintiffs brought this action against the named Maggiolo defendants and G & A Contracting Corp. (which for all intents and purposes are one and the same entity, and will hereinafter be referred to as "Maggiolo"), as operators of a dump truck, which was owned by co-defendant-appellant Ronnie Gorr and leased to Maggiolo.

The case was tried to a jury in the United States District Court for the Eastern District of New York from November 25, 1974 to December 12, 1974.

This appeal raises for appellate review the following questions:

1. Conduct of plaintiffs' trial counsel as being prejudicial and mandating a new trial.

2. Error of the trial court in connection with rulings addressed to the second deposition of David Utegg, and rulings in connection with evidence offered to rebut the deposition testimony of David Utegg.

3. Prejudicial atmosphere in the courtroom in connection with the presence and conduct of plaintiffs' infant children during the course of the trial.

4. Refusal of the court to grant a mistrial, on petition of defendants, or *sua sponte*.

The plaintiffs allege that on April 24, 1972, Robert Elliott was in the employ of the Village of Woodridge, Sullivan County, N. Y., in the road maintenance department. At that time Maggiolo, pursuant to a contract with the village, was engaged in demolishing some old buildings, removing the material to a dump in the village, and leveling the demolition sites.

The essential allegations of plaintiff are as follows:

1. On April 24, 1972, he was operating a village truck.

2. Some time prior to 11:30 a.m. on that date he drove said truck to one of the demolition sites in the downtown section of the village, which site had previously been demolished, and he obtained a courtesy load of fill from a Maggiolo employee, which he then:

3. delivered, gratis, to Frieda's Bungalow Colony (owned by one Joseph Schacht, and hereinafter referred to as "Schacht");

4. he dumped the fill on Schacht's property, drove off the property and;

5. parked his truck on the shoulder of Glenwild Road, on the same side as Schacht's, and then

6. on foot, crossed Glenwild Road, to the opposite side, to clean a storm drain or catch basin.

7. While standing in the roadway, in the vicinity of the catch basin, a truck came up towards him travelling at a slow speed. He turned his body to face the oncoming truck, which then passed him, and he was then struck across the side of his face by a board, which allegedly dislodged from a pile of demolition material on the truck and he

8. sustained the injuries sued for; deafness of one ear and blindness of one eye, *inter alia*.

9. Plaintiff's identification of the truck as being owned by Gore and operated by Maggiolo was presented by way of circumstantial evidence.

Maggiolo's defense included a denial of the very happening of the accident, the extent of the injury and claimed permanency. In essence, Maggiolo's defense was that:

A) At the time and place of the alleged accident, none of Maggiolo's trucks or drivers were on Glenwild Road and, perforce, the accident did not occur, as alleged by plaintiff.

B) The plaintiffs' claims were fabricated, out of the whole cloth.

C) Plaintiff's claim of total disability and unemployability were exaggerations, not supported by competent proof.

As part of plaintiffs' prima facie case, there was read into the record a deposition of one David Utegg, who on April 24, 1972, was in the employ of Maggiolo, as a truck driver.

Utegg testified, by deposition, that on April 24, 1972, at about 11:30 a.m., he was driving a truck (on behalf of Maggiolo) down Glenwild Road; that he saw the plaintiff Robert Elliott standing in the roadway, and that he (Utegg) knew nothing about a plank falling from his truck, or striking Elliott.

It is appellant's contention that plaintiffs' trial approach was to obtain a favorable verdict, by foul means, or fair. Hard proof lacking, plaintiffs' trial counsel substituted technique guile, disingenuousness, feigned naivety, etc., for proper conduct, all to the prejudice of defendants.

THE LAW.

POINT I.

The overall conduct of plaintiffs' trial counsel created a climate of unfairness and prejudice, mandating reversal and the granting of a new trial.

The trial record exceeds 2,500 pages. The task of culling out therefrom examples of the unfair and prejudicial conduct of counsel brings to mind the mot of the re-

nowned playwright and wit George S. Kaufman, who, at the bridge table, requested "a rebid, with the original inflections." The cold printed pages of the record fail to emit the nuances of conduct, the tones, the grimaces, and the general atmosphere which impelled Judge Mishler to make a finding that plaintiffs' trial counsel was guilty of "reprehensible conduct" (A. 35).

In order to fully appreciate the technique employed by plaintiffs' counsel, it is vital to understand what plaintiff was attempting to prove; what existed and what was missing by way of hard proof, and how plaintiffs attempted to supply the missing ingredients.

Plaintiffs had direct proof that on April 24, 1972, Robert Elliott was treated by a physician, or physicians, in Woodridge and then sent to a hospital for further treatment of an injury to the left side of his face.

Plaintiffs lacked direct proof of a plank falling from a *Maggiolo* truck on Glenwild Road at 11:30 a.m., striking Elliott on the left side of his face.

The gap between the foregoing was bridged, or attempted to be bridged, by *innuendo*, supposition, arithmetic, and circumstantial evidence, all held tenuously together by improper reference to matters excluded by the trial judge, false accusations, disingenuous statements, "planted" histories, courtroom facial grimacing, cute children displayed in the courtroom to tear at the heartstrings of the jury; in sum total, the full panoply of an advocates arts, wiles, and guile.

A) "Planted" history:

The medical records pertaining to Elliott's Workmen's Compensation claim were put in evidence. The physician

who signed the report was a Dr. Immerman, who was never called to testify. The history given was:

> "A board hit me in the face while working *on* the truck" (Maggiolo Exhibit A). (Italics added.)

At the trial, plaintiffs called Dr. Immerman's partner, Dr. Consentino, who stated that he, and not Dr. Immerman, treated Elliott on April 24, 1972. Plaintiffs' counsel developed the history, from Dr. Consentino, as follows:

> "Q. Please tell the court and jury what history you obtained that morning on April 24, 1972? A. I wrote on that day: 'Accident. Hit in face by a plank, which fell *off* a passing truck while working.'"

Dr. Consentino admitted that his partner, Dr. Immerman was present at the time of treatment. From the outset, the language of the so called "histories" was inconsistent. From a medical point of view, it mattered not whether the plank fell from a truck or from elsewhere. Plaintiff made certain that the jury always heard only the history which was consistent with his liability claim.

Elliott was then taken to Liberty Hospital, on April 24, 1972, where he was seen by a Dr. Bessen, who reported to the Compensation Board "Was struck in face with board at work."

On September 11, 1972, Dr. Bessen wrote a report "To whom it may concern" (a euphemism for plaintiff's attorney Mr. Orseck) (s.m. 1067) wherein the history was now expanded to read:

> "While at work a passing truck, loaded with debris, had a board fall off striking patient on the left side of the face."

Dr. Bessen was called to the trial, clearly for the sole purpose of his testifying to history (s.m. 1066):

> "Q. And did you place the history down on the *hospital record* itself? A. Yes sir, its placed here on the record.
> "Q. Could you please tell us what the history was?
>
> "Mr. Sergi: Objection.
> "The Court: Overruled; I will allow it.
>
> "A. The history was that he was working at the side of the road. There was some urban renewal work going on in Woodridge and there was a truck with some debris that passed, a board fell from the truck and hit him and he was struck by the board on the side of his face—
>
> "Mr. Sergi: *Are you reading from the hospital record?*
> "The Witness: *No, I am telling him as he asked me to.*
>
> • • •
>
> "Q. Hold it, Doctor. Did you place that history on a personal report of yours? A. I placed the history on a report, yes sir, I did.
> "Q. Was a copy of that report sometime later given to Mr. Orseck? A. Yes it was."

Dr. Bessen admitted that he had "known Mr. Orseck for a number of years" (s.m. 1072).

Notwithstanding the fact that the history in the hospital record was limited to "struck in face with board" the doctor was permitted to give a history which showed up in a report *some five months after the accident.* On cross examination, the doctor admitted that he could not

recall what part of the history was given by Mr. Elliott and, yet, he was permitted to testify to a history which supported the plaintiff's version of the accident to a "tee"; history clearly given to hi[illegible] by counsel, and not the patient as part of treatment.

Appellee dwells on this aspect of the testimony at this time to demonstrate the pattern which started with Doctors Consentino and Bessen (i. e., "planted" history, meaning history given to doctors by the attorneys), and which culminated in the summation which will be discussed, *infra*.

We come now to the testimony of Dr. Gaynin, the eye specialist (s.m. 948):

> "Q. Would you be good enough to tell this court what history you obtained?
>
> "Mr. Sergi: Objection.
> "The Court: I will allow the doctor to tell you (the jury) what history was given him by the patient. But again I caution you, that what the patient told the doctor cannot be used to support the plaintiff's version of how this accident happened. It is solely for the doctor's use in treating the patient. You have a right to know what he told the doctor for the doctor's use in treatment and for no other reason.
>
> "A. He told me that on 4/24/72 while on a highway he was struck by a plank which fell from a truck."

On cross examination, Dr. Gaynin was interrogated as to the source of the information which he included in his history (s.m. 1009). He stated that he obtained a history from Elliott on August 14, 1972, which he included in a

report dated October 13, 1972, which report was addressed to "whom it may concern" and sent to Mr. Orseck (s.m. 1009):

> "Q. Would you now read the history which appears in your report, doctor? A. 'I was given a history that on 4/24/72, while working for the Village of Woodbridge, Sullivan County, he was struck by a plank that was stored on a truck that passed on the highway.'
>
> "Q. There is nothing in there doctor, about a board falling from a truck, is there? A. *No.*
>
> "Q. Where did you get that thought that you stated here in the courtroom that that was the history that was given to you by Mr. Elliott, that a board fell off the truck, when in fact in you your report as of 10/13/72, you don't state that a board fell off a truck. A. The patient may have *subsequently* said something to me about that. I'm not sure."

There is further pertinent testimony that Dr. Gaynin changed his office records from "compensation case" to "liability" (s.m. 1014). Of vital significance is testimony that by letter dated *October 14, 1972*, subsequent to his alleged obtaining of history from Elliott, and almost simultaneously with his October report, he obtained a letter from Mr. Orseck (Def. Ex. P, evid.) which was read to the jury (s.m. 1019) and which reads in part:

> "At the time of the accident he was standing on the road cleaning a clogged drain, when a truck loaded with debris, boards and planks came by. A plank or board extending beyond the body of the truck hit him in the face as the truck went by causing him to suffer serious head and facial injuries."

Juxtaposing the original history of 4/24/72 (predicated upon which Dr. Gaynin treated), with the later *expanded*

history furnished by the *attorney*, it becomes obvious that the latter history was planted, *in anticipation of trial*. The clear intention of counsel was to enable the jury to hear the expanded history, under the guise of pertinent history necessary to enable a physician to treat.

During the cross examination of Dr. Gaynin, trial counsel indulged in some of the conduct which the court later characterized as reprehensible (s.m. 1037):

> "The Court: Incidentally, Mr. Edelman, when I reprimanded you and when the doctor agreed, you just threw the paper down and looked at the jury as if to, say, 'See, I told you'. You look at a jury and get affirmations and confirmations and agreements from the jury. I know some of it is part of you, and it started, I'm sure, when you began to practice law but if it becomes too obvious I am going to sit you down."

(s.m. 1060):

* * *

> "The Court: Mr. Edelman, you asked questions that required the doctor to say where he got the information, that gave the plaintiffs the opportunity to show that he did give a history to Vassar Hospital, and then, of course, Mr. Edelman *had to repeat it and ask if it was consistent. That came close to violating the edict of the Court. To the average lawyer, I would sit him down, but I expect less from Mr. Edelman.*" (Italics added.)

Why did the court make special allowance for Mr. Edelman?

B) Summation:

(A. 164):

"(2431) Number three, if you remember, Mr. Elliott stated to you that when he got into the hospital itself, the Community General Hospital in Liberty, they asked him what occurred, and he told them exactly what had occurred.

"By the way, he told them that a passing truck, a board fell off and hit him in the face, and they told them and they wrote it down. Certainly at that time it is incredible that he would not be telling the truth, if you are looking for where the truth is.

* * *

(A. 165):

"Did they ever confront him with anything that indicated one single deviation from the simple truth, as this man told it from the day of the happening of this occurrence?

"Then the next thing is, he is taken from there to the Vassar Brothers Hospital in Poughkeepsie, and if you remember, and at that time it was virtually emergency operations, so later the same day, long before any lawyer is even in the case—and you remember at that time he also stated, they asked him the history, and he gave them the history exactly as he said it, and—

"Mr. Sergi: Excuse me, your Honor, that was not included in the Exhibit, it was excluded by your Honor, and he is now commenting on the—

"The Court: May I have that statement?

"(2432) (Record read.)

"Mr. Edelman: This is Mr. Elliott's testimony. They wrote it down. That's all, nothing more than that. You remember—

"The Court: What do you say about it, Mr. Sergi?

"Mr. Sergi: He is referring to a—

"The Court: Is there any application?

"Mr. Sergi: I object, your Honor, to his comments on evidence which—on history which is not in evidence. He is referring to it and saying that it confirms the plaintiff's position.

"He doesn't have to read it.

"The Court: I have excluded any history in any hospital report. That is as a matter of law. Don't consider it.

"Mr. Edelman's repetition of the history does in no way add to the credibility of Mr. Elliott's testimony that he gave before you on the witness stand. You understand that. It was only admitted for one purpose, to show the treatment, and to the extent that the history was necessary for the treatment, it was admitted, and for no other reason.

(A. 166):

"So the repetition by Mr. Edelman of all the histories before the doctor, and the implication that he (2433) might have given it elsewhere, adds nothing whatsoever to Mr. Elliott's testimony.

"Now go ahead, Mr. Edelman.

"Mr. Edelman: All right.

"Remember also Dr. Ganin got on the stand, and they asked him about his records, and Dr. Ganin—By the way, this is in evidence, and I am strictly sticking to the record, your Honor.

"Mr. Robert Elliott, he says, patient, detailed story of accident. 'While on highway was struck by plank.' And originally was, 'from highway.' It was changed from 'highway' to 'from truck' with the same pen, as you see, as the entire examination.

"And then later on, apparently, he went ahead and added in another pen, 'which fell from truck.'

"Mr. Sergi asked him where he got this story, where it fell from the truck, and he said he got it from the Vassar Brothers Hospital record.

"Mr. Sergi: Your Honor, I must object strenuously. Why does he refer to something your Honor told him not to refer to?

"The Court: The jury may be excused.

"(Jury excused.)

"The Court: What do you want me to do, Mr. Sergi? (2434) Do you want a mistrial at this late stage?

"Mr. Sergi: I cannot believe—

"The Court: Do you want a mistrial?

"Mr. Sergi: Let me put my comment on the record, I have to get it off my chest.

"The Court: I am ready for it, Mr. Edelman.

"Mr. Sergi: I cannot believe that he is doing it without intention. He knows he should not.

"The Court: Of course he is."

The court had excused the jury, and then called them back in, and charged them as to the only legitimate use of history. Whereupon the following incredible thing happened, Mr. Edelman continued his summation as follows:

(A. 165):

"Go ahead, Mr. Edelman.

"Mr. Edelman: Thank you, your Honor.

"In connection with the original hospital record, the record of Community General Hospital regarding time, you will see that according to that portion of the history, it says, '11:30 A.M.' Not 12:00 o'clock. This was made—

"(2436) Mr. Sergi: Your Honor, I don't know whether he doesn't understand you. If 11:30 is not part of the history, I don't know what is part of the history.

"The Court: The time he checked into the hospital?

"Mr. Sergi: He's talking about the time of the accident, 11:30 A.M.

"Mr. Edelman: Not the manner in which the accident happened.

"The Court: Are you saying that the hospital record says he came into the hospital 11:30?

"Mr. Edelman: No. It states the fact that the accident happened 11:30.

"The Court: Of course that is wrong. Of course it's wrong. Mr. Edelman, you know better. You are an experienced trial lawyer.

"I keep admonishing you about things, but you pay no attention to me whatsoever. There are rules, and the rules are intended for fair trial, but you won't obey them.

"Go ahead."

The trial court noted the methodology of plaintiffs' counsel (A. 148):

> "*The purpose is obvious; you are trying to prove liability through inadmissible proof.*"

(A. 114):

> "You're not interested in offering this to show that it was necessary for medical treatment you want to show that he was hit by a board on the liability question. It has nothing to do with the treatment and I won't allow it."

The planting of the history in the doctors' reports, and the persistent reference thereto during the trial, all culminated in the foregoing use thereof in the summation.

C) Other improper conduct:

What is surprising is that the court persistently told counsel that the court knew what he was doing, but, nevertheless, the court took no measures to stop it. It was incumbent upon the court to take sanctions, either to declare a mistrial, *sua sponte*, or to hold counsel in contempt. In the absence of any sanctions whatsoever, Mr. Edelman engaged in brinksmanship. As defendant Maggiolo pointed out in the motion for a new trial (A. 30):

> "In any event, counsel kept getting in his 'licks.' He took tremendous risks with the *Court*, in return

for a large verdict. This heroism has no place in the Court room, and is not to be condoned."

* * *

(A. 31):

"Does not the plaintiff now have the 'last laugh'? All of the anger which plaintiffs' counsel engendered, all of the disrespect for the judicial process which he demonstrated, are mere anecdotes, the record is no more than a scrapbook; plaintiffs made their point; they are proud and delighted beneficiaries of a $378,000 verdict. What does it matter to them how they obtained it? The defendants, and the court, remain behind as pawns, and mere instruments which resulted in a large verdict for plaintiff. What benefits do the defendants derive from counsels' disingenuous apologies to the court, from his 'misunderstanding' of the court's rulings, from his lapses of memory?"

The trial court held that "* * * its strong reprimand before the jury of plaintiffs' trial counsel removed any possible advantage to plaintiffs or prejudice to defendants" (A. 35). It is respectfully urged that the compartivly mild statements of the trial court to the jury were not sufficient to overcome the persistent improper acts of counsel. As a matter of fact the record reveals that *all serious admonitions to counsel where made in the absence of the jury, not in the jury's presence.*

Note for example, defendant's request for a mistrial (A. 127):

"Mr. Sergi: This jury has been contaminated not only with innuendos but improper questions, summations, mannerisms, improper demonstrations, demands of counsel which questioning counsel knows I don't have. * * * For the last 6 or 7 days the

> same thing has been going on. He has been admonished repeatedly and repeatedly and he still does it. In the sense of fair play, I don't know what else I can do."

Whereupon, Mr. Edelman "apologized" (A. 128) claiming that he was not aware of his conduct (cf. A. 128, 129, 130, 131, 132). Compare the conduct of counsel with the court's mild charge to the jury in connection with what had just transpired (A. 132, 133). The foregoing notwithstanding, Mr. Edelman ignored the rebuke, and made a demand, in front of the jury, for a recording. What did the trial court do? (A. 138):

> "Mr. Edelman: At this time I ask for the production of the recording, your Honor.
> "Mr. Sergi: Your Honor has admonished Mr. Edelman about this.
> "The Court: Did I ask you not to make a demand in front of the jury?
> "Mr. Edelman: *I'm sorry.*
> "The Court: *You apologize and keep doing it.* You don't obey the directions of this Court. You just completely disregard it every time, Mr. Edelman no matter how clearly and emphatically I state it.
> "Mr. Sergi: He is doing it on purpose.
> "The Court: The jury is excused.
> "(Jury excused.)
> "The Court: You are just impossible to control. You don't care about anything the Court says. You just have a way of trying this case—no one, not defense counsel, the Court, or law—nobody. That's the way you try a case. Have you got the records Mr. Sergi?
> "Mr. Sergi: I state unequivocally, as an officer of this Court that I have never seen or heard it." (Italics added.)

The trial court was exasperated, with good reason, but nevertheless permitted the trial to continue, to the preju-

dice of defendants. The following colloquy, in the *absence of the jury*, demonstrates the manner in which the trial court handled the foregoing improper demand for the alleged recording (which, by the way, plaintiffs' counsel never pursued, having made his grandstand play; which is all he really wanted) (A. 138, 139):

> "Mr. Edelman: I'm sorry. It is a matter of habit.
> "The Court: I don't care what your habit is. If that's your habit and you can't get out of it you should not try cases in this court.
> "Try your case elsewhere. We can't take it.
> "Mr. Sergi: Once more—and I say it sincerely and regrettably—I don't know how in the world we can try this case with Mr. Edelman's tactics.
> "This Jury has been contaminated and prejudiced by comments and gestures and by counsel's refusal to accept admonishment in this case.
> "It is impossible for this Jury to decide this case *and I move for a mistrial.*
> "I don't know how we can correct it.
> "You keep saying it to him—
> "The Court: I don't think this is of such prejudice that it will make a difference to the Jury but I am thinking of doing it just to 'teach Mr. Edelman a lesson.'
> "It cost him money to prepare the case. If I declare a mistrial it will probably cost him a couple of thousand dollars. Perhaps, that's the lesson Mr. Edelman needs.
> "Mr. Sergi: Your Honor, I don't think my client should be prejudiced in order to teach Mr. Edelman a lesson.
> "The Court: Your client won't suffer so much but the Court is suffering."

* * *

(A. 140):

> "The Court: * * * And the next time you have a trial before me, if you do, I am just going to assign it to someone else.

> *"I just can't stand your antics any more. Why should I?* Seat the jury."

Whatever sanctions were justified should have been exercised *at the time*. The fact that Mr. Edelman would be given an opportunity to repeat his antics in the future, before a different judge, afforded no protection to defendant-appellant at bar.

The range of antics ran the gamut from the foregoing examples to such minor antics as the following (A. 141):

> "The Court: Don't give the appearance that you are reading from a document if your not, Mr. Edelman.
> **"Mr. Edelman: All right.**
> "The Court: That's improper.
> "Mr. Edelman: All right."

(A. 144):

> "Mr. Sergi: Objection. Same question answered before.
> "The Court: We will have it again. Go ahead. Go ahead, It's repetition. It's time wasting. It does no good.
> *"The Court: I found it impossible to control the lawyers (sic) by just ruling on objections, so I am letting them (sic) do the wrong things until they finally realize that the jury will not like it, you see, and then they will stop. That is the one time they will stop it."*

It is urged that the foregoing manner of handling improper conduct is error, mandating a new trial. The concept of affording counsel enough rope, in the hope that he will hang himself with a jury, is not the proper judicial alternative (Rule 61, FRCP). Defendants were entitled to a mistrial, which was consistently denied them.

A. 146:

> "The Court: * * * If this is another grandstand play then let Mr. Edelman have it."

Apparently the trial court had prior experience with Mr. Edelman (A. 109):

> "The Court: But the point is that I make a ruling and you ignore it. You know, *you have a track record with me.* You do very well in the final result but if you get it your going to get it fairly, Mr. Edelman.
>
> "Mr. Edelman: I am trying.
>
> "The Court: You may be trying in your own peculiar way. You are trying to win and *you couldn't care how you go about it*, and I won't allow it."

Defendant's motion for a mistrial was again denied (A. 110):

> "Mr. Sergi: On behalf of Maggiolo, I move for a mistrial on the ground that the jury has been contaminated by Mr. Edelman in his opening statement that the doctors in the history have supported the plaintiff's position and he has done it again and (55) again and he then apologizes to the Court which doesn't correct the situation that this jury now has in their minds that doctors who examined and treated this plaintiff both at their office and in hospitals have histories that sustain the plaintiff's position and confirm his description of the accident. I say, it is incurable. We cannot remove that from the jury's mind by Mr. Edelman's apologies to the Court.
>
> "The Court: Well, first, I will accept Mr. Edelman's version of what the history shows. If it shows no more than a piece of lumber falling from a truck and striking him in the face, that doesn't show any liability at all. I thought it showed that

the truck was improperly loaded, that the speed at which the truck was going would indicate negligence. What he said so far, if that is all it showed—

"Mr. Edelman: May I show it to your Honor?

"Mr. Sergi: I am not saying that.

"I am saying without further description of any history by any doctors, this jury has heard not once but twice if not more, from Mr. Edelman, *that the doctors have confirmed the manner in which the plaintiff said he was hurt*—the manner in which Mr. Edelman says the plaintiff says he was hurt; that he was cleaning out a catch basin, a truck was driving (55a) by and something flew off and hit him in the left side of the face *and he says the doctors in the history confirmed that.* (Italics added.)

"The Court: May I see the history?

"(56) Mr. Sergi: I have histories. I don't know which one he handed to you.

"He referred to Dr. Consentino:

"'Mr. Bob Elliott was brought into this office because of injuries sustained when a log or plank fell off a passing truck and struck him in the face. He was cleaning the cover of a catch basin on the Woodridge-Glenwild Road when the accident happened.'

"Now, how much more can a doctor say to mouth the position that plaintiff has now described to this jury?

"The Court: I can think of a lot more—that the truck was improperly loaded; that there was a log at the top—

"Mr. Sergi: I am saying at this moment, without testimony, Mr. Edelman said that the plaintiff will prove that this truck was overly loaded driving down Glenwild Road, the plaintiff was minding his own business doing his own work in a catch basin and the doctors will confirm what the plaintiff said.

"How much will be confirmed is not known.

"I say, because of this, this jury's mind and position has been contaminated with prejudice against the defendant and *I move for a mistrial.*

"The Court: *The motion is denied.*

"(57) I will try to correct any false impressions.

"Mr. Sergi: I don't know how.

"The Court: Well, you listen.

"Mr. Sergi: I listened to the Court's admonishment to Edelman and it meant nothing.

"The Court: That's something different. The refusal of Mr. Edelman to abide by the Court's ruling is another ground, and that I will do regardless of prejudice.

"Seat the jury.

"(58) (Jury entered jury box.)"

All of the foregoing quotations from the record represent examples of the conduct of trial counsel, but do not exhaust the entire spectrum of such conduct.

The trial court should have granted a mistrial, either on motion of defense counsel, or *sua sponte*. It is urged that the judgment below be set aside and a new trial granted by reason of such conduct.

POINT II.

The rulings in connection with the treatment of the David Utegg depositions constituted reversible error.

All of the witnesses called by plaintiff came from a great distance from the courthouse. Of all such witnesses, the only one who testified by *de bene esse* deposition was David Utegg. This man's testimony was vital, and its treatment below constituted reversible error.

Set forth in the appendix on appeal is a verbatim transcript of the "Proceedings on Defendants Maggiolos' Motion for Adjournment" (A. 86 *et seq.*).

Plaintiff lacked direct proof that he was struck by a board which fell from a Maggiolo truck. His own testimony was that a board fell from *a* truck. Proof that it was defendants' truck was then lacking. If plaintiff could establish that a Maggiolo truck was on Glenwild Road at the time plaintiff alleged he was injured, the jury would have circumstantial evidence from which they could concluded that the truck was Maggiolos'. To accomplish this plaintiff managed, somehow, to obtain the cooperation of Maggiolos' driver David Utegg. They did not bring him to the trial, but opted for taking his testimony *de bene esse*.

We respectfully urge the Circuit Court to read the entire transcript of Utegg's first deposition (s.m. 81-133) (not reproduced in the appendix for economy of space). It will be noted, on careful examination, that this deposition is a classic in the art of leading. Taken at random, note the following formulation of a vital question and answer (s.m. 103, 104):

> "Question: Can you recall, sir, whether, on the morning of April 24, 1972, whether you were carrying some debris, or whether you were carrying some sand to the other place?
>
> "Answer: Some days we'd haul both.
>
> "Question: I didn't ask you that, sir. I am asking specifically about April 24, 1972. That's the day this accident was supposed to, occur, and that you were driving down this road, and you observed the truck and the man in the road, *is that correct?* On that day sir, I am calling on your recollection.
>
> "Answer: *Right.*"

If one continues to read the transcript of the deposition beyond this point one notes that, whenever Mr. Utegg was left to his own recollection he could not actually recall

the events of that day. Whenever this occurred, Mr. Edelman simply led him into "proper" answers. Bearing this type of testimony in mind, as one examines the circumstances of David Utegg's being called into the case, the failure of recollection, *unled*, can best be explained. The "circumstances" referred to involve the various interviews conducted at Mr. Orseck's office, wherein he, as attorney of record for Elliott, attempted to supply proof through Maggiolo' drivers. To fully appreciate how David Utegg came to be a witness in this case requires a reading of the testimony of Harold Utegg (A. 196), and Brian Dubois (not reproduced in the appendix for economy of space). It is clear, if one believes these other drivers, that David Utegg was coerced into giving testimony, in exchange for some *quid pro quo*, between himself and Mr. Orseck.

Defendants suspected that there was something "rotten in Denmark" in connection with the *de bene esse* deposition of David Utegg. Investigation revealed that this man had in fact admitted to his own brother Harold Utegg, also a Maggiolo driver, that he (David) had not told the truth at the first deposition. We were firmly convinced that the only way we could expose this fraud was to bring David Utegg into the courtroom, to confront a Federal judge and jury, in an atmosphere where plaintiff's counsel could also be controlled by the court, and where leading could be avoided, or at least kept to a minimum. We were convinced that if there ever would be a recantation, it could only take place in open court (A. 25, 89).

Accordingly, we made every effort to bring David Utegg into court. Several days before the trial we were forewarned, through our own investigative sources, that when the trial day arrived David Utegg would be in a hospital

and unavailable. Accordingly, as officers of the Federal Court, with many years of practice before that court, defense counsel prepared an *affidavit*, setting forth these facts, openly, to Judge Mishler. cf. affidavit of Benjamin J. Sergi, Esq. (A. 23 *et seq.*).

This culminated in a special application being made to the trial court, on notice. The transcript of that application is reproduced in full in the appendix herein (A. 86 *et seq.*). Defense counsel attempted to make it very clear to the court that they were not interested in subsequent criminal proceedings, which would afford no financial protection to their client. The concern was to make a proper defense to what appeared to be a fraudulent case.

Judge Mishler's ruling was unclear. He first granted the adjournment (A. 99). He then reversed himself. The following ruling by the court was not clear:

> "The Court: Now, this case is on for trial Monday marked ready. In the meantime, I want you to get a statement from the doctor or at least be prepared to put in an affidavit of your own, when Mr. Eutag will be ready to travel. Tell me whether or not he's ready to appear in court voluntarily and it will be helpful if you took a deposition of Mr. Eutag as to what happened. Ready for Monday before we pick a jury with or without Mr. Sergi's consent and cooperation.
> "(30) If he wants to go there and cross examine, fine. If he doesn't, take his deposition on the matters contained here.
> "Now, if I'm satisfied on Monday that Mr. Sergi's claims are baseless and Mr. Eutag is ready to come to court to testify, then I'll proceed without questions.

"Now, that's again forecasting that the criminal case will plead. So, come in on Monday and let's see what there is further in the mystery story.

"Mr. Edelman: No. Your Honor, I am, for the record, I am ready to go to Scranton at any time. Let Mr. Sergi—

"The Court: Now, Mr. Sergi is not ready to go with you. I expect you to go yourself and *I expect you to take a deposition.*

"Mr. Edelman: I will.

"The Court: A full deposition and don't feed the witness the questions, please. *Just tell him what happened.* I know the Edelman type of question.

"Mr. Edelman: I will go ahead and present it exactly as your Honor stated for my own protection.

"The Court: All right.

"Mr. Edelman: Honestly."

Why did the court direct *plaintiffs'* counsel to redepose Mr. Utegg? Why did the court direct *plaintiffs* counsel to "take his deposition on the matters contained here," *supra*, and A. 104? Who had the obligation or burden to tell Mr. Utegg what?

Defense counsel asked the court why it was necessary to "* * * go up and sit in a deposition with Mr. Edelman and have him reiterate what he stated before * * *" The following answer by the trial judge is what created the subsequent confusion (A. 106):

> "The Court: You can bring *all the witnesses* that he said he lied about (*sic*) when he made the deposition and have *him* testify to the jury and tell the jury that he told *them* he lied, that's all." (Italics added.)

This mixture of persons, plural and singular, is not italicized to be gramatically critical, but rather to point

out the confusion created in the mind of counsel. The Judge went on to refer to bringing an investigator to the deposition. Did the court believe that David Utegg had admitted his untruths to an investigator? Defense counsel made no such representation. Defendant's investigator learned that David admitted his lies to his brother Harold, and Harold was brought into court to testify to David's admission of lying. On the one hand the court made reference to bringing an investigator to Scranton, and on the other hand stated that he would permit "all the witnesses" to testify that David said he lied.

The court created additional confusion when it stated (A. 106): "Let him (David Utegg) deny the *investigator* ever said it." Said what? How would David Utegg know what the investigator said?

The court then went on to state (A. 107):

> "But you have a way of attacking the credibility of Eutegg. If he made those statements on any number of occasions to a trained investigator have the investigator here to tell the jury he's a liar. *That's the way to do it.*"

Counsel went to Scranton and redeposed Utegg. Both depositions were read at the trial (second deposition at A. 171 *et seq.*).

Thereafter, on the defense case, defendant Maggiolo called to the stand the person to whom David Utegg had in fact admitted he lied, namely his brother Harold Utegg. Harold testified (A. 196) with respect to the events in Mr. Orseck's office, when Mr. Orseck attempted to obtain favorable testimony from any, or all, of the drivers (Dubois and the two Uteggs) (A. 199).

The moment of truth arrived. Defendant's counsel was about to have Harold testify that David admitted to him (Harold) that he (David) had lied. This was consistent with Judge Mishler's ruling that defense could call "all the witnesses that he lied when he made the deposition" (A. 106). The moment of truth was shortlived (A. 209):

> "Q. Did you ever have any conversation with your brother David after he gave that testimony? A. Yes sir.
>
> "Q. What did he tell you about it?
>
> "Mr. Edelman: I respectfully object.
>
> "The Court: Objection sustained. I will sustain any questions that relate to conversation that this witness had with his brother. *It's pure hearsay.*
>
> "Mr. Sergi: I don't think we have to excuse the jury, your Honor. I just want to bring this to your attention, if I may.
>
> "(Handing document to Court.)
>
> "I ask whether I can ask those questions now.
>
> "The Court: No. That doesn't change my mind at all. I didn't buy that ruling in any way he eliminated the need for a foundation. I explained that to you on any number of situations."

Mr. Sergi abided by the court's ruling. This ruling is now presented on this appeal.

During the course of colloquy (A. 148) the question again arose as to what the court had ruled on the application for an adjournment. The court had a copy of the transcript of that proceeding. The following comment by the court is enlightening (A. 148):

> "The Court: I painted myself into a corner on that."

It is respectfully urged that counsel for the defense found himself in a difficult legal corner. Having accepted

the court's ruling, on its face, that the defense would be permitted to call witnesses to testify that David Utegg had admitted, prior to the trial, and subsequent to the first deposition, that he had lied, counsel did in fact call such a witness, only to be confronted by the court's *amended* ruling, during the trial, that such testimony would be hearsay (A. 209).

During the course of the trial there was some discussion with respect to the general rule that where a witness is confronted with a prior inconsistent statement, on cross examination, the interrogator must first afford the witness an opportunity to explain or deny the same (Rule 613 of The Federal Rules of Evidence, effective July 1, 1975). At the time of the trial the court did not refer to the impending Rules of Evidence, but rather to McCormack on Evidence, Section 37, page 72 (s.m. 1166).

Appellee urges that what was attempted to be proven at bar was not a "prior inconsistent statement" (i. e., a statement made by David Utegg prior to his first deposition) but rather proof that David Utegg made a *subsequent admission* of false swearing. The distinction can be postulated as follows: Where one party has a signed statement by a witness that the traffic light was red, and that witness later testifys that the light was green, the witness can, or must, be confronted on cross examination with his prior red-light-statement. Assume that a witness never gave a prior statement, but comes into court on the first occasion and gives testimony which is totally false, and thereafter stops at a local bar, and states to the bartender: "I have $500.00 which I received today from lawyer 'X' for giving false testimony." Assume that, *after* the witness testifies, the defense learns of that conversation. May the defense then call the bartender as a rebuttal witness to prove the fraud?

The distinction appears to be between a prior inconsistent statement, and subsequent knowledge of false testimony.

It is the view of McCormack that:

> "Even more clearly it seems that when the inconsistent statement was made *after* the testimony was given, the foundation should be dispensed with." McCormack on Evidence, Section 37, page 73. (Italics added.)
>
> * * *
>
> "When it (the foundation) is overlooked by the impeacher, as it often is, then seemingly the judge should have the discretion to consider such factors as the lack of knowledge of the inconsistent statement on the part of the impeacher when he cross examined, the importance or unimportance of the testimony under attack, and the practicability of recalling the witness for denial or explanation, and in the light of these circumstances to permit the impeachment without the foundation or to permit departure from the traditional time sequence if it seems fairer to do so." McCormack, *supra*, pages 74, 75).

At bar, it is clear that the impeacher had no knowledge of the inconsistency (i.e., falsity) when the first deposition was given, since the admission was made subsequently. The importance of the testimony under attack is patent, and does not bear underscoring. With respect to recalling David Utegg, defendant requested that a subpoena issue by the court under Rule 45 FRCP and the court denied the application. The trial court did not make clear what the purpose of the Scranton deposition was, and further the court did not direct any conditions precedent (other than attendance at Scranton) to the defendants' right to "bring in all the witnesses that said he lied" (A. 106).

The foregoing to the contrary notwithstanding, it is urged that at the second deposition of David Utegg *he was in fact confronted with the claim that he admitted to his brother Harold that he lied* (A. 191):

> "Q. On the evening of July 11, 1974, the evening after you had testified at the deposition, did you have any conversation with your brother Harold? A. A couple minutes. He was out to my sister's; yes.
>
> "Q. After the deposition, in that conversation with your brother, did you tell your brother that it was not true that you were driving a truck down Glen Wild Road the morning of April 24, 1972? A. No."

Did Judge Mishler exclude conversations between David and Harold Utegg because the foregoing questions did not contain the talismanic words of confrontation with prior or subsequent inconsistent statements, or did he exclude the conversation on the ground of hearsay? The initial exclusion was on the ground of "pure hearsay" and then on the ground of "need for a foundation" (A. 209).

The hearsay argument is erroneous. If a witness makes a direct admission of false swearing, how can this be hearsay, vis a vis the one to whom the statement was made? The question was not asked of Harold whether some third person told him that David admitted to the third person that David lied. The testimony was to be with respect to direct statements made by David to Harold. How does "pure hearsay" come into play?

(A. 194):

> "Q. Was that on the street, in your brother's house or your house where the conversation took place? A. I was standing on the lawn, front yard.

"Q. And there was a conversation between you and Harold? A. Yeah, we were talking.

"Q. And were you talking about your testimony? A. No.

"(43) Q. Was there any conversation about your testimony? A. No.

"Q. Did you tell your brother at that time that you wanted to recant or change your testimony that you had given on the deposition? A. No.

"Q. Did you have any other contact with your brother by phone or person, writing or otherwise, after that second occasion? A. No.

"Q. At any time after that, at any time up to the present time, did you ever tell your brother Harold Utegg that you wanted to change your testimony and that you wanted to recant? A. No.

"Q. At any time did you tell your brother that your testimony that you gave during the deposition was not true? A. No."

Assuming the requirement of foundation, which appellee rejects, can it be argued that the foregoing (setting forth the time of a conversation, and the location thereof, and the confrontation with the claim of admission of untruth) does not meet the requirement of confrontation and foundation? Why was this proffered testimony rejected as hearsay? Appellee urges reversible error in the exclusion of this vital testimony of Harold Utegg.

The jury heard the preliminary testimony with respect to what took place at Mr. Orseck's office (A. 199). Why did the court not permit the jury to hear the balance, or postlog, that David admitted to Harold that David's sworn testimony that David was on Glenwild Road at 11:30 a.m. was not true; that David admitted he would recant if called to court.

The rulings with respect to the David Utegg depositions require reversal and a new trial.

POINT III.

Plaintiffs created a prejudicial atmosphere in the courtroom (A168).

Standing alone, the presence of plaintiffs' young children in the courtroom would not be raised on appeal. But the presence of these children does not stand alone; it was part of the general plan of the plaintiff. As Judge Mishler pointed out, trial counsel had a "track record" in this court (A. 109) with a "way of trying" a case (A. 138).

When the court suggested that the younger child be kept out, Mr. Edelman persisted and directed that the older one be left in the courtroom. No extended comment need be made in this regard.

The court noted (A. 209, 210):

> "The Court: Incidently, when you talk to your clients tell them each time that they walk into the courtroom with the children, its when the jury walks in, its an obvious play for sympathy, and I might say something if that continues.
>
> "Mr. Orseck: No.
>
> "The Court: I don't think its right. Now I don't know why—don't these kids go to school.
>
> "Mr. Orseck: No.
>
> "The Court: Why aren't they in school today.
>
> "Mr. Orseck: One does, one doesn't.
>
> "The Court: I don't want to keep them out of the court, but I think it's ridiculous.
>
> "*Each time the jury walks in they come through the courtroom door.*
>
> "The kids stay away all during the trial. They came in for the summation and charge. I don't know what they learned from it.
>
> "Mr. Orseck: Is that off the record.

"The Court: No. I insist that this is going to be (*sic*) a fair trial and if this keeps up I'm going to tell the jury that these young children are being marched through that door for the purpose of sympathy. If you want that I'll do it.

"Mr. Orseck: No, I'll keep them out."

POINT IV.

The trial judge should have declared a mistrial in the interests of justice.

Does Rule 61 FRCP mandate a new trial? Appellee urges that the record, viewed in its entirety, supports a finding that the refusal of the trial court to declare a mistrial, or set aside the verdict, was "inconsistent with substantial justice."

The purpose of Rule 61 was to separate captious arguments from substantial deprivation of rights.

Appellee does not cavil with the general proposition that a District Court's judgment will not be reversed if errors in exclusion of evidence are not prejudicial to substantial rights of a party. *Commercial Credit Corp. v. United States*, 175 F. 2d 905, 908. Where, however, the record demonstrates that the exclusion of evidence which a party attempted to introduce in a proper manner was essential to his case, it is prejudicial error to exclude it. See *Thurber Corp. v. Fairchilds Motor Corp.*, 269 F. 2d 841, 844.

The record at bar must be viewed in its entirety. The defense properly advised the court of the claim of fraud. Within the bounds of reasonableness, the trial court should have afforded the defense a reasonable opportunity to pre-

sent its proof in that regard. Having rejected a most vital aspect of defendant's proof, the jury was left with the plaintiff's version, almost intact, which version was presented by trial counsel in a manner not to be condoned. One can understand the dilemma of the trial court in its desire to avoid further clogging of already heavy calendars. The issues at bar however must not be measured in terms of court congestion, but on their merits.

CONCLUSION.

The judgment below should be reversed and a new trial granted in the interests of justice.

Respectfully submitted,

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3/11/75